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No. 09-1104

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARLENE WHITTIER,

Petitioner,

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN, ERIK PALACIO, ANDRE BRUNA, and SEAN VISNERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS BRUNA AND VISNERS

HARRIET R. LEWIS
LEWIS, STROUD & DEUTSCH, P.L.
1900 Glades Road, Suite 251
Boca Raton, Florida 33431
hlewis@lsdlaw.net
(561) 826-2800

Attorney for Respondents, Bruna and Visners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether there is no tension between the Eleventh Circuit's decision and prior rulings of this Court.

2. Whether the Eleventh Circuit's ruling in this case is not in direct conflict with decisions of several other circuits and review should not be granted as there is no split on this issue.

3. Whether resolution of this issue is not of crucial importance to civil rights plaintiffs, police officers, and third parties, as the issue has already been resolved by this Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Petitioner, Marlene Whittier, and Respondents, Daniel Kobayashi, Eric Goldstein, Erik Palacio, Andre Bruna, and Sean Visners.

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STATEMENT OF THE CASE

A. The events of August 5, 2005

During the early morning hours of August 5, 2005, Anthony Diotaiuto, a 23-year-old, well-known drug dealer raised his gun, pointed and aimed it at Andre Bruna and Sean Visners, two City of Sunrise, Florida SWAT team members, who, along with the remaining members of the SWAT team, had legally entered his residence to execute a "high risk" search warrant. When Anthony Diotaiuto pointed his weapon at them, he put both of them in fear for their lives.

Petitioner's version is totally without support. The actual events leading up to this confrontation are set forth below. Petitioner's version of the events in her Statement of the Case, is totally without factual support.

Anthony Diotaiuto was a known drug dealer who, with his mother, Marlene Whittier, resided in a house in the City of Sunrise, FL. He frequently used illegal drugs and also sold large quantities of illegal drugs from his house, in excess of felony limits. After Diotauito's neighbor, Mohammed got tired of the late night parties, constant coming and going of cars like a "7/11" store and the frequent use of cocaine and marijuana at the house next door to where he lived with his grandchildren, he decided to take action. On July 14, 2005, he reported Diotaiuto and the activities at his house to the Sunrise Police Department. Mohammed told Detective Calise that Diotaiuto received shipments of marijuana in duffel bags and

sold large quantities of narcotics from his house. Additionally, the detective was advised that people in Diotauito's house used cocaine. Rather than rushing with the investigation, Detective Calise commenced an orderly and textbook narcotics investigation.

First the Diotaiuto house was placed under surveillance and the officers noted numerous people going into and leaving the residence, many stopping for only a matter of minutes. Alexander Liebster, one of the visitors was found to be driving under a suspended driver's license, and after being stopped by officers, admitted to having purchased illegal drugs in a felony quantity from Diotaiuto. Liebster agreed to assist with the ongoing investigation and advised the police about Diotaiuto's drug sales and distribution operation, as well as the presence of firearms in the house. He also agreed to make a felony drug buy from Diotaiuto on July 29, 2005, while being electronically monitored by police. This controlled buy was successfully completed, and rather than a "suspicion that Anthony was selling drugs from his residence," the police had clear and convincing evidence that he was.

In addition to his involvement with the sale of narcotics, the police learned that Diotaiuto collected guns, and kept both a shotgun and a handgun in his home, in addition to possessing a concealed weapons permit.

With all of this evidence for support, Calise pursued a search warrant, seeking authorization for the seizure of, among other things, firearms, illegal

drugs, drug paraphernalia and other aspects of this criminal enterprise. On August 3, 2005, Judge John Frusciante signed a Search Warrant which not only authorized, but commanded the Sunrise Police Department to search the premises and vehicles thereon. Furthermore, Judge Frusciante authorized the warrant to be served at any time the City so desired, and further authorized the City to serve the warrant while the occupant(s) was/were home.

Detective Calise prepared a plan for executing the Search Warrant, which was reviewed by Lieutenant Charles Vitale. The plan was further reviewed at the command/supervisor level, where the threat assessment previously prepared was reviewed, discussed and analyzed. The Sunrise Police Department then classified the warrant as ***"high risk."***[1] The SWAT team had been informed by the informant of

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[1] It should be noted that the threat assessment matrix form approved by the National Tactical Officers' Association would have scored the Diotaiuto warrant in the highest risk category possible (35 points or more) based upon this criteria: (1) prior drug-related arrest; (2) additional occupant in the home (Diotaiuto's mother); (3) the presence of a shotgun; (4) the presence of a handgun; and (5) subject uses illegal drugs. It is important to note that the threat was actually greater than that known at the time the command staff decided to use SWAT since there were actually three (not two) firearms in the house, i.e., a .380 caliber semiautomatic handgun, a 12 gauge pump action shotgun and a .30-.06 caliber rifle, as well as an illegal PVC cannon, a BB pistol and an arsenal of over 100 rounds of ammunition.

weapons owned by Diotaiuto some of which, they were told, were located in his bedroom closet.

Prior to arriving at Diotaiuto's home, a briefing was held at the Sunrise Police Department, and the members of the SWAT in attendance were informed that their role was to serve a high risk search warrant.

According to the City of Sunrise's policy, warrants which are classified as ***"high risk"*** are served by the City's SWAT team. The officers on the City's SWAT team have received extensive training far in excess of that recommended.

Since the inception of the City's SWAT team in 1991, it has performed over one hundred operations, with varying tactics depending on the threat assessment. The incident in this case is the one and only time any member of the SWAT team has even discharged a firearm during an operation.

After the decision to utilize the SWAT team was made, an operations plan was prepared by the SWAT supervisor, Sgt. Daniel Kobayashi. The operational plan called for the team leader to knock and announce and for a distraction device to be deployed before entry.

During the early morning hours of August 5, 2005, the SWAT officers involved in the operation, with the exception of Sean Visners, who was briefed privately later, attended a briefing at the City substation. The SWAT officers reviewed their tactical

plan, which was to utilize high-risk tactics and to flood the house upon entry by making sure each room/entry was clear and safe.

In following the operational plan, and with officer safety in mind, Sgt. Daniel Kobayashi, the team leader, knocked and announced that the Sunrise Police were there to serve a search warrant in a manner that would notify any occupant in the house of the presence of the police.[2] Having received no response and after waiting for approximately 12-15 seconds, the breach team was called in to begin preparations for breaching the door. Since this particular door opened outward, there were several steps in the process, the first step being the breach team had to approach the door and ready their tools, which took about three seconds. Next a Halligan tool had to be placed into the door opening above the lock, which took about another two seconds. Lastly, once the tool was set, the battering ram had to be lifted and slammed up against the door. In this case, this was done approximately two-to-three times. In all, breaching the door generally takes over ten seconds.

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[2] While there is some dispute amongst the neighbors as to whether or not they heard the "knock and announce," or for that matter could have heard it, when it allegedly occurred at approximately 6:00 a.m., on the morning of August 5, 2005, investigation of this alleged conflict determined that the neighbors did not even hear the battering ram which broke down the front door, and thus would not have heard a "knock and announce."

Although there have been past occasions when individuals have come to the door prior to and during the process of a door being breached, generally with respect to drug dealers, they are too busy hurrying to dispose of and flush contraband and hide firearms when they learn that the police are about to enter. Here, Diotaiuto made no effort to answer the door, for approximately twenty-five seconds, from the initial knock and announce to the time the door was breached, after several seconds of officers pounding on it with a ram.[3] In fact, when the door was breached and the officer looked into the house and then threw a diversionary device, he saw no signs of Diotaiuto initially. The distraction device detonated in the rear/left of the living room, near the doorway to the decedent's bedroom.

After the distraction device detonated, the SWAT officers, dressed in full SWAT gear with the word "POLICE" printed clearly on their uniforms, began to enter the house. Upon entering the police found

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[3] Petitioner disputes the overwhelming evidence of a knock and announce by claiming that by using a battering ram to gain entry, the police used "an entry technique that is used only when there is the element of surprise; knocking and announcing would eliminate any surprise before the entry." (Pet. 2) There is no support for this in the record, simply because it doesn't make sense. Battering a door by ramming it could not possibly equate to "an entry technique that is used only when there is the element of surprise. . . ." It is more than likely the most plausible way of securing speedy entrance to a house through a locked door when, after the knock and announce is given, the resident does not open the door.

Diotaiuto in the living room near the wall unit to the right. According to Plaintiff's own expert, if Diotaiuto were in this location when the diversionary device detonated, he would have been, at an absolute minimum, six feet and possibly further from it at that time. Distraction devices do not cause injury at this distance. Thus, once again, there is no record evidence to support Petitioner's assertion at page 3, of her Petition that the flash-bang distraction device was detonated about six feet away from Diotaiuto, who stood in the first room of the house, or that he appeared shocked and disoriented when the police entered. Additionally, if there is no record evidence to support Petitioner's claims that Diotaiuto was six feet away from the distraction device when it detonated, there is certainly no record evidence to support Petitioner's claim that a flash-bang device was thrown "next to him", as alleged on page 4 of Petitioner's Petition.

Furthermore, both the Broward County Associate Medical Examiner, Marie Herrmann, M.D., and Plaintiff's own forensic pathology expert, Michael Baden, have confirmed that, on autopsy, the decedent showed no signs of injury, whatsoever, from the distraction device. At the close of the evidence herein, there was not one *scintilla* of evidence that either Diotaiuto or anyone else, for that matter, standing six feet from such a device when it detonated, sustained any injury from the device. In fact, Diotauito's actions

left no doubt that he was quite lucid at the time, able to coordinate, visualize clearly and hear.[4]

Diotaiuto looked right at the officers who were wearing full SWAT gear. There is no record support for Petitioner's statement that "The officers admitted that he appeared stunned, confused, and frightened." (Pet. 4). In fact, despite the fact that the police were yelling at him to get on the ground, he chose to ignore this request. Instead he ran to his bedroom closet where the officers knew he kept his weapons. He chose this route to procure weapons rather than leave as there were means available to him to exit his house, including the bathroom door in his bedroom, which opened on to the outside patio. Clearly, he was not attempting to leave the house and escape a home invasion.

Fearful for the safety of themselves and the other officers, Visners and Bruna decided to follow Diotauito and apprehend him in his bedroom, so that he could not arm himself with one of his guns, and jeopardize the lives of any of the officers.

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[4] There is no evidence that Anthony's behavior was consistent with that of a startled, blinded individual in fear for his life, desperately attempting to protect his home and family from unknown intruders, as alleged by Pet. 4 of her Petition. All evidence is to the contrary, including that of Petitioner's own experts, as set forth above.

Surprisingly, and despite Petitioner's unsupported claim that the distraction device caused him shock and disorientation, he ran straight for his bedroom door very deliberately and without any difficulty, not stumbling, or bumping into walls or furniture, entered his bedroom and, once inside, remembered to slam the bedroom door, in an effort to gain some sort of time advantage over the police who were pursuing him. He then made a right turn once past the door, ran past or jumped over his bed, made a left turn toward the closet and then another right turn into the closet, again without any difficulty. Before he was able to get into the closet, where he kept his arsenal of firearms, Visners kicked the bedroom door open and yelled "police."

Visners and Bruna, knowing full well from the pre-raid briefing and intelligence gathered that the closet was where Diotaiuto kept his weapons, commanded him not to come out of the closet with a gun. Diotauito again refused to comply and both Visners and Bruna heard the distinct sound of Diotauito racking his gun. Diotauito then appeared in the doorway of his closet with a semi-automatic handgun in his hands and pointed it at Visners. Fearing for his life, Officer Visners, who was located in a more advantageous position in front of Bruna, opened fire, aiming at center mass, shooting with the intent to immediately inflict fatal injuries with each shot. Visners had never before fired in the line of duty in over ten years as a police officer. With the first series

of shots, Diotauito either retreated into the closet voluntarily or went back because of gunshot wounds. The officers approached to insure that the threat had ceased and both observed Diotauito still with the gun rigid in his hand. Then, from a seated position in the closet, he began to raise the gun again, at which time Visners yelled repeatedly "drop the gun" and Bruna virtually yelled the exact same thing with some additional expletives included. Diotauito again disregarded the officers and continued to raise his gun at Visners. At this point the fatal shots were fired. Visners then stepped on Diotauito's hand and Bruna manually removed the gun and placed it out of Diotauito's reach. Interestingly enough, and contrary to Petitioner's suggestion at page four of the Petition, a total of only eleven shots were fired by both Visners and Bruna combined during the two exchanges they participated in, as verified by both the medical examiner and Petitioner's own forensic pathologist, Dr. Michael Baden. While some of the bullets entered, and then exited and then re-entered Diotauito's body, it is clearly an attempt to mislead this Court by stating that he "lay dead on the floor from approximately twenty-five gunshot wounds," without clarifying how many actual shots were fired. (Pet. 4).

An additional and noteworthy attempt to mislead this Court stems from Petitioner's statement that "[t]he officers themselves never claimed that there

were exigent circumstances justifying entering without knocking and announcing. They maintained that they had knocked and announced, though as mentioned above, there was strong evidence to the contrary." (Pet. 5). What Petitioner fails to mention, and one can only assume, deliberately omits, is that the officers' Motion for Summary Judgment was grounded on the doctrine of qualified immunity and the evidence in support of this Motion was that fourteen officers heard the knock and announce; that no neighbors heard it, but that even Petitioner's experts stated that they wouldn't have heard it. Even more important is that the officers presented testimonial evidence that even though the neighbors were of the belief that they would have heard a knock and announce had same occurred, when the knock and announce was recreated, the very same neighbors didn't hear it. Furthermore, the very same neighbors did not hear the battering ram, used just seconds after the knock and announce. Petitioner presented no evidence contrary to this, either by way of witness or expert testimony. Clearly, this is not "strong evidence" to the contrary, as suggested by Petitioner.

REASONS FOR DENYING THE WRIT

Petitioner has suggested that this Court should grant review for the following three reasons:

a) To resolve a clear split among the Circuits;

b) To resolve an apparent conflict with a prior decision of this Court, and;

c) To resolve an issue of national importance as to whether there is a blanket exception to the knock and announce requirement when the police have reason to believe that a weapon is lawfully present in a dwelling where a search is to occur.

As set forth the Petition should be denied because none of the Petitioner's reasons justify this Court's review.

I. There Is No Tension Between The Eleventh Circuit's Decision And Prior Rulings Of This Court.

Petitioner argues that this Court has been emphatic that the Fourth Amendment embodies the constitutional rule that unless there are exigent circumstances, police must knock and announce before entering a dwelling. *Wilson v. Arkansas,* 514 U.S. 927, 936 (1995). Citing to *Kyllo v. U.S.,* 533 U.S. 27 (2001). Petitioner goes on to argue that this is based on the importance given to the sanctity and privacy of the home under the Fourth Amendment. Then,

Petitioner claims the facts of this case supposedly are illustrative that the knock and announce requirement provides crucial protection for the safety of both police and residents, and when police enter without knocking and announcing, homeowners, impliedly such as Diotaiuto, may well mistake them for dangerous invaders and act accordingly in self defense.

However, to accept Petitioner's account of the issues and facts, one must turn away from the evidence in the record and view this case purely as a hypothetical situation. Even if one were to assume, that a genuine issue of material fact existed with respect to whether or not a knock and announce took place that is immaterial to the Eleventh Circuit's analysis. There is a total lack of evidence, or it simply cannot be said decedent mistook the fourteen members of the Sunrise Police Department SWAT team, who had the word **POLICE** printed across their chests, for "dangerous invaders." There is likewise a total lack of any evidence that the breaking down of the front door with a battering ram, deploying a distraction device which went off six or more feet from Diotaiuto caused him any injury such as confusion, deafness, or blindness, which inhibited his ability to understand the words "police" when it was yelled as the SWAT team entered the residence. There is no evidence justifying his running into his bedroom, going into his closet, racking his gun, ignoring shouts of "police" as well as numerous orders to drop his gun, and on two separate occasions,

aiming his automatic weapon at the police officers, to warrant the belief that he was acting in self defense.

Petitioner states there is a clear and obvious tension between the Eleventh Circuit's opinion in this case, which Petitioner urges creates a blanket exception to the knock and announce requirement in cases where police believe that drugs and weapons are present. *Richards v. Wisconsin*, 520 U.S. 388 (1997). Petitioner argues the *Richards'* Court rejects a blanket exception to the knock and announce in all drug felony cases where officers did not possess "specific information about the dangerousness, or the possible destruction of drugs in a particular case" *Id.* at 390.

In *Richards*, there was in fact a knock-and-announce at the motel room door, by police officers, dressed in plain clothes, and at least one, dressed as a maintenance man. *Id.* at 388. Richards opened the door with a chain lock on and when he saw and recognized the police he slammed the door in their faces and attempted to exit through a window. Richards claimed that the officers failed to knock and announce their presence prior to forcing entry into the room. The Wisconsin Court determined that exigent circumstances justifying a no-knock entry are always present in felony drug cases and further reasoned that the violation of privacy that occurs when officers who have a search warrant forcibly enter a residence without first announcing their presence is minimal, given that the residents would ultimately be without authority to refuse the police entry. *Id.* at 390. The *Richards'* Court, citing to *Wilson*

found that it recognized the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." *Wilson* at 514 U.S. at 936, 115 S. Ct. at 1919. It is indisputable that felony drug investigations may frequently involve both of these circumstances. *Richards* at 392.

In *Richards*, this court determined that in order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime, for example, allowing the destruction of evidence. This Court explained this standard (as opposed to a probable-cause requirement), strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual. *Richards* at 394.

Clearly, this Court has adopted a standard different than that of probable cause with respect to the execution of a search warrant without a knock and announce by requiring "reasonable suspicion" that a knock and announce would result in danger, futility, or the destruction of evidence. In *Richards*, this Court agreed with the trial court and with Justice Abrahamson, where the circumstances in the case showed that the officers had a reasonable suspicion that Richards might destroy evidence if given further

opportunity to do so. Richards also argued that the officers' entry was unreasonable in that the Magistrate who signed the search warrant for his motel room deleted the portions of the proposed warrant that would have given the officers permission to execute a no-knock entry. This fact did not alter the reasonableness of the officers' decision, which must be evaluated as of the time they entered the motel room. Although, at the time the officers obtained the warrant, they did not have evidence sufficient in the judgment of the Magistrate to justify a no-knock entry.

In discussing *Richards,* and applying it to the instant case, the Eleventh Circuit noted that this Supreme Court rejected a categorical exception, which some courts created with respect to the knock and announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. To the contrary the Eleventh Circuit found that in *Richards*, this Court adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394. In evaluating the facts at bar, the Eleventh Circuit found that Officers Bruna and

Visners were entitled to qualified immunity, despite the fact that the lower court determined they were not because of the existence of a genuine issue of material fact, i.e., whether or not the SWAT team knocked and announced. The trial court did not analyze the facts below in light of whether or not arguable reasonable suspicion existed, which would have warranted a finding of qualified immunity on the officers' behalf. The existence of arguable probable cause is sufficient to find that an officer is entitled to qualified immunity when the actual test is whether or not probable cause existed. *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990). Thus, like a finding of arguable probable cause, the Eleventh Circuit understandably found that when a reasonable officer would have had arguable reasonable suspicion, that knocking and announcing would have been dangerous under the circumstances facing the SWAT team herein, therefore, he was likewise entitled to qualified immunity.

In analyzing the circumstances facing the SWAT team, the Eleventh Circuit found that knocking and announcing would have been dangerous under either of the Petitioner's or Respondents' two scenarios, and in either event the two officers were entitled to a finding of qualified immunity, as arguable reasonable suspicion, like a finding of arguable probable cause, existed.

The Eleventh Circuit found that the circumstances facing the officers, *i.e.*, including serving a search warrant on the home of a suspected drug

dealer, who had ready access to firearms and occupied the premises that the SWAT team arrived at to serve the warrant justified the finding of qualified immunity. Indeed, based on the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, the Court found, was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry.

The issue is not whether actual exigent circumstances existed or what the officers' subjective beliefs were as they stood in the stack outside Diotaiuto's front door because the officer's subjective beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Jackson v. Souls*, 206 F.3d 1156, 1165 (11th Cir. 2000). The standard for determining if qualified immunity applies, as reiterated by the Eleventh Circuit, is whether an officer violated clearly established law; this is an objective standard which does not include inquiry into the officer's subjective intent or beliefs. While it is true that on analysis, the trial court found in denying Respondents' Motion for Summary Judgment that no exigent

circumstances existed to justify a no knock and announce entry, that inquiry is irrelevant to the analysis. As the Eleventh Circuit stated " . . . the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Bruna and Visners, *could have believed* they did." *Jackson*, 206 F.3d at 1165.

The Eleventh Circuit also noted that it has held an officer is entitled to qualified immunity even when he reasonably, but mistakenly believes reasonable suspicion is present. *Brent v. Ashley*, 247 F.3d 1294 at 1393 (11th Cir. 2001). Thus, the Court found that it makes little sense to not afford the same protection to officers who, like Bruna and Visners, are sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believe the situation involves a constitutional protection, but later learn it does not.

Therefore, arguing that the Eleventh Circuit created a "blanket exception" to the knock and announce requirement of the Fourth Amendment for situations where drugs could be destroyed or weapons utilized is simply not supported by the record or the opinion at issue. All the Eleventh Circuit's opinion did was adopt the same reasoning that has been utilized in qualified immunity decisions for years, dealing with probable cause and arguable probable cause, by applying the same doctrine to reasonable suspicion and utilizing an additional subcategory of arguable

reasonable suspicion in determining the existence of qualified immunity.

II. The Eleventh Circuit's Ruling In This Case Is Not In Direct Conflict With Decisions Of Several Other Circuits And Review Should Not Be Granted As There Is No Split On This Issue.

Petitioner would have this Court believe that the decisions cited are in direct conflict with not only *Richards* but also decisions from five other circuits. Petitioner is incorrect. The decisions are in full accord with *Richards*.

As examples of conflict, Petitioner cites to a series of criminal cases dealing with Motions to Suppress based upon the Fourth Amendment. These cases conclusively are distinguishable from the instant case, and upon cursory review do not establish a direct conflict with the Eleventh Circuit's decision.

By way of example, in *United States v. Nabors*, 901 F.2d 1351 (6th Cir. 1990), the court ruled that once a knock and announce took place, the police could not immediately, within a split second, enter the suspect's apartment even though the officers identified themselves as police and had obtained a warrant to search for weapons and other evidence despite the officers' belief that Nabors was suspected of trafficking in narcotics. The *Nabors* Court determined that the police had violated 18 U.S.C. § 3109, a statute of no influence on this case. The

issue of qualified immunity was not before the *Nabors* Court and the decision of the Sixth Circuit in 1990 is not precedent to be considered herein. The issues decided in *Nabors* related to the suppression of evidence seized which is completely different than the civil court issue of arguable reasonable suspicion in determining qualified immunity. Just as importantly, and an obvious omission by Petitioner herein, is that the statute relied upon for comparison in the majority of the cases cited by Petitioner in her Petition deal with 18 U.S.C. § 3109, which does not apply to state officers executing state warrants. *United States v. Tavares*, 223 F.3d 911 (8th Cir. 2000); *United States v. Murphy*, 69 F.3d 237 (8th Cir. 1995); *United States v. Andrus*, 775 F.2d 825 (7th Cir. 1985); *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994).

In *United States v. Spinelli*, 848 F.2d 26 (2nd Cir. 1988), another case inappropriately relied upon by Petitioner, the Court determined that the law enforcement officers who entered Spinelli's house without the requisite knock and announce under 18 U.S.C. § 3109 met both the objective and subjective criteria that was then necessary for such entry. Once again, in determining whether or not to reverse the lower court's denial of a motion to suppress evidence seized. The *Spinelli* Court upheld the lower court's decision that the evidence was properly seized. Of course, qualified immunity and the elements necessary to support this defense were not at issue in *Spinelli*.

Additionally, none of the remainder of the cases relied upon by Petitioner in an attempt to establish conflict jurisdiction pass the litmus test, as none answers the question presented to the Eleventh Circuit, i.e., whether the Respondents are entitled to qualified immunity. Rather the remainder of the cases cited by Petitioner are criminal in nature and deal with suppression of evidence, not civil liability when the officers have qualified immunity.[5]

III. Resolution Of This Issue Is Not Of Crucial Importance To Civil Rights Plaintiffs, Police Officers, And Third Parties, As The Issue Has Already Been Resolved By This Court.

This case does not present an issue that must be resolved by this Court to avoid confusion and uncertainty with respect to fundamental Constitutional rights.

The actual issue in this case is whether the Eleventh Circuit Court of Appeals correctly applied *Richards* to include arguable, reasonable suspicion in a no-knock and announce police entry to serve a search warrant.

This Court has properly determined that a no-knock and announce entry may be acceptable, and

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[5] The one case dealing with qualified immunity relied upon by Petitioner has absolutely nothing in common with this case. *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005).

provide the basis for qualified immunity, when entry is based upon a reasonable suspicion or arguable reasonable suspicion of objectively exigent circumstances justifying immediate entry. The issue of whether law enforcement officers may be afforded qualified immunity is a particular, fact-specific case where, without first knocking and announcing their presence, and based upon objectively exigent circumstances they serve a search warrant for illegal drugs and evidence of drug trafficking at a residence occupied by an individual in possession of a number of firearms, has been addressed and resolved by this Court, and does not need to be revisited.

CONCLUSION

Based upon the evidence, law and argument presented above, the Petition for Writ of Certiorari should be denied.

Dated this 15th day of April, 2010.

Respectfully submitted,

HARRIET R. LEWIS
LEWIS, STROUD & DEUTSCH, P.L.
1900 Glades Road, Suite 251
Boca Raton, Florida 33431
hlewis@lsdlaw.net
(561) 826-2800

Attorney for Respondents,
Bruna and Visners